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No. 71-1295

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In the Supreme Court of the United States

OCTOBER TERM, 1971

DAVID H. WENGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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Assistant Attorney General,

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals affirming petitioner's conviction was entered on January 26, 1972 (Pet. App. B), and the petition for rehearing and rehearing en banc was denied on March 10, 1972 (Pet.

App. C). The petition for a writ of certiorari was filed on April 7, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied his rights to due process and a speedy trial by delay in obtaining the indictment.

2. Whether the indictment is invalid because based in principal part on hearsay testimony of the investigating agent.

3. Whether petitioner was denied a fair trial by the admission of hearsay testimony which the jury was subsequently instructed to disregard.

4. Whether the evidence was sufficient to support petitioner's conviction.

STATUTE INVOLVED

The Internal Revenue Code of 1954 (26 U.S.C.) provides:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall * * * be guilty of a felony * * *.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner, a certified public accountant (R. 402),[1] was

[1] "R." refers to the appendix in the court of appeals.

convicted of having willfully attempted to evade part of his 1963 income tax in violation of 26 U.S.C. 7201. He was sentenced to three years' probation and fined $7500. His conviction was affirmed by the court of appeals (Pet. App. A, B). A petition for rehearing was denied without opinion (Pet. App. C).

Petitioner's indictment was returned by a grand jury for the Eastern District of New York on March 31, 1970 (R. 1). The transaction giving rise to this indictment had been the subject of a similar grand jury investigation in 1968, but the grand jury at that time had not been asked to indict petitioner on the instant charge because the Internal Revenue Service special agent's report had not then proceeded through normal administrative review procedures, including conferences with the taxpayer (R. 365, 635-637). Although several witnesses had testified before the grand jury in 1968 (R. 366), the evidence before the 1970 grand jury consisted of several documents (R. 627-628) and testimony by the Internal Revenue Service special agent.[2] At trial, petitioner was furnished with all pertinent 1968 and 1970 grand jury evidence (R. 610, 654-655).

The evidence at trial established that in 1963 petitioner assisted in the making of a loan of $125,000 to Handy Associates, Inc. by a union pension fund which he served as accountant (R. 50, 407). Petitioner told Melvin Semel, the attorney for Handy Associates, that his fee for arranging the loan would

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[2] Special Agent Silverman's testimony is found in the Joint Exhibit Appendix filed in the court of appeals, at 104a-130a.

be $15,000 and he requested Semel "to work out a tax avoidance plan, in an attempt to get a capital gain for the fee" (R. 410).[3]

Semel suggested to the corporation president, John Handy, an antique collector, that petitioner be allowed to purchase some of Handy's antiques at a discount and to realize a capital gain by reselling them at an appreciated price (R. 413, 418). Thereafter, petitioner paid $5,000 to Handy for certain antiques, which petitioner in turn 'sold' for $20,000 to an antique dealer who, by prior agreement with Handy, immediately 'resold' the antiques to Handy Associates (R. 56-63, 167-182). The antiques at all times remained in Handy's possession (R. 177-188). On his income tax return for 1963, petitioner reported a short-term capital gain of $15,000 on the sale of the antiques; this gain was completely offset by long-term losses so that no tax liability was reported on account of the transaction. Petitioner reported no finder's fee in connection with the loan to Handy Associates (R. 463).

During petitioner's trial, before the conspiracy count was dismissed as to Semel (see note 3, below), John Handy's son, Edward Handy, in testimony admitted only as to Semel, stated that Semel had informed him that petitioner's fee was to be paid not by check, as he had anticipated, but by the pur-

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[3] Semel was charged with conspiracy to evade tax as petitioner's co-defendant, but the government subsequently dismissed the conspiracy count as to Semel and called him as a prosecution witness (R. 400).

chase and resale of antiques (R. 39-41, 44). After the charge against Semel was dismissed the jury was instructed to disregard this testimony (R. 401). Thereafter, Semel himself testified that Edward Handy suggested several ways of arranging purchase and resale transactions so as to create a $15,000 gain (R. 572-573, 577-578, 580). During the jury's deliberations it requested to be read certain portions of Semel's testimony relating to Edward Handy, and the trial judge, with the agreement of petitioner's counsel, complied with the request (*ibid.*; R. 571).

ARGUMENT

1. Petitioner contends (Pet. 10-14) that the delay prior to indictment violated his rights to due process and a speedy trial. However, this Court has recently ruled that the protections of the speedy-trial provision of the Sixth Amendment are engaged only by "either a formal indictment or information or else the actual restraints imposed by arrest" (*United States* v. *Marion*, 404 U.S. 307, 320), expressly stating that "we decline to extend the reach of the amendment to the period prior to arrest" (*id.* at 321). Since the record does not indicate, and petitioner does not contend, that he was arrested on the instant charge prior to indictment, petitioner has no basis for a Sixth Amendment claim here.

In *Marion*, the government did concede that the Fifth Amendment "would require dismissal of the indictment if it were shown at trial that the pre-indictment delay * * * caused substantial prejudice

to [a defendant's] rights to a fair trial and that delay was an intentional device to gain tactical advantage over the accused" (*id.* at 324). No such showing has been made here. Indictment was delayed to permit petitioner the benefit of administrative review procedures (R. 635-637) and not in order to obtain any unfair advantage. See *Donaldson* v. *United States*, 400 U.S. 517, 534-535. Furthermore, petitioner's assertion of prejudice (Pet. 5-6) is speculative and insubstantial. Cf. *United States* v. *Ewell*, 383 U.S. 116.

2. Petitioner contends (Pet. 15-17) that he was denied due process because his indictment was returned on the basis of hearsay testimony of Special Agent Silverman. The courts below correctly noted the additional fact that the basic documents evidencing the loan and antique transactions were before the grand jury (Pet. 5a; R. 367). Silverman's grand jury testimony (Joint Exhibit Appendix, 104a-130a) shows on its face that it was not given in such a manner as to mislead the grand jury into believing it was other than hearsay, and the court below (Pet. 5a) was satisfied that unlike *United States* v. *Leibowitz*, 420 F. 2d 39, 42 (C.A. 2), and *United States* v. *Rifkin*, 451 F. 2d 1149, 1154 (C.A. 2), the presentation of hearsay evidence to the grand jury in this case did not involve any risk of prejudice.

The petitioner was, of course, furnished the special agent's elaborate investigative report as well as the numerous prior statements of witnesses, thus eliminating any basis for concern in this case that abbreviated grand jury procedures may substantially reduce

a defendant's ability to probe the credibility of witnesses. Hearsay evidence which is fairly summarized is an adequate basis for an indictment. *Costello* v. *United States*, 350 U.S. 359, 362-364. This is particularly so where the summary is given by the investigating agent in a tax evasion case. *Jaben* v. *United States*, 381 U.S. 214, 224-225.

3. Petitioner contends (Pet. 17-21) that the admission of Edward Handy's testimony relating to Semel constituted reversible error. However, after dismissal of the charge against Semel the jury was repeatedly instructed to disregard this testimony, which had been admitted only as to Semel (R. 31, 34, 38, 40, 41, 401). Thus the trial court did not deviate from the rule urged by petitioner that "hearsay admitted solely against the dismissed defendant cannot be utilized by the jury if the remaining defendants do not bring it again to the attention of the jury" (Pet. 20).[4] Furthermore, as the court of appeals noted (Pet. 5a), the confrontation right protected in *Bruton* v. *United States*, 391 U.S. 123, was here preserved by Semel's subsequent appearance as a witness.[5]

4. Petitioner's contention (Pet. 21-22) that he was innocent of concealment, and therefore of any wilful attempt to evade taxes, is insubstantial. His mis-

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[4] Petitioner's assertion (Pet. 21) that the jury requested a rereading of the excluded hearsay is plainly false. The request pertained to Semel's testimony and was so understood by the trial court and petitioner's counsel (R. 571-573).

[5] There was, moreover, ample nonhearsay evidence tending to establish petitioner's intention to represent his fee income as a capital gain (R. 408, 410, 414-418).

representation that he received a capital gain when he actually received fully taxable earned income was not uncovered until it became the subject of an elaborate investigation in 1966, when Special Agent Silverman was assigned to investigate petitioner's relations to union pension funds (R. 602-603). Attempts to evade tax by falsely claiming capital gains or losses are not uncommon. See *United States* v. *Bursten*, 453 F. 2d 605, 609 (C.A. 5). Sophisticated taxpayers, including certified public accountants such as petitioner, should be held accountable for sophisticated attempts to evade taxes.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted.

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